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Oct. J. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 188.

THE UNITED STATES, EX REL. WILLIAM S. PETERKIN, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 5, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 188.

THE UNITED STATES, EX REL. WILLIAM S. PETERKIN, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 *Petition for writ of mandamus & order thereon.—Filed March 30th, 1876.*

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

UNITED STATES OF AMERICA, EX REL. WILLIAM S. Peterkin,
versus
THE MAYOR ET AL. OF THE CITY OF NEW ORleans. } No. 7819.

To the honorable the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of the United States of America on the relation of William S. Peterkin, a citizen of the State of Maryland, residing in Baltimore, in that State, with respect, represents:

That on the 21 May, 1875, relator recovered a judgment in this honorable court against the city of New Orleans, in the suit 7297 on the docket, for the sum of eighteen thousand dollars, with interest at the rate of six per centum per annum on sixteen thousand dollars, from 1 May, 1874, and on two thousand dollars, from 1 September, 1874;

2 that on execution issued thereon the sum of five thousand six hundred and eighty two $\frac{45}{100}$ dollars was realized and received on the 29 July, 1875, which was then credited on said judgment; that subsequently another execution was issued for the balance remaining due on said judgment, which, after due demand of the parties, was returned nulla bona.

That there is no property out of which said judgment can be made belonging to the said defendant that is subject to seizure under execution, and relator cannot make his money except this the writ of mandamus to be issued by this honorable court, ordering the levy and collection of a tax for that purpose.

That the mayor and administrators of New Orleans, who represent and exercise the corporate powers of the city of New Orleans, refuse to levy and collect a tax to pay the said judgment of relator, and put him at defiance, and he is entirely without remedy to collect said judgment by the ordinary levy of execution upon the property of said corporation.

That the mayor of New Orleans is Charles J. Leeds; the administrators are Edward Pillsbury, administrator of finance; James G. Brown, administrator of accounts; Leon Bertoli, administrator of water-works and public buildings; Dennis McCarthey, administrator of

3 *of* police; J. O. Landry, administrator of commerce; P. L. Bouny, administrator of asses'ment, and E. H. Burke, administrator of improvements, who are now in the possession of their said offices and in the full exercise of the powers thereof.

Wherefore, petitioner prays that a writ of mandamus issue, ordering the said Charles J. Leeds, mayor of the city of New Orleans, and Edward Pillsbury, James G. Brown, Leon Bertoli, Denis McCarthey, J. O. Landry, P. L. Bouny, and E. A. Burke, administrators of said city, be ordered to levy and collect a tax sufficient to pay the aforesaid judgment, interest, and costs; when collected, to pay the same to relator in

satisfaction of his said judgment, interest, and costs, & for general relief.

(Signed) SEMMES & MOTT,
Att'ys of Pl'f & Relator.

Let the defendant show cause on the 15 April, 1876, at 11 a. m., why a writ of mandamus should not issue, as herein prayed for.
March 30th, 1876.

(Signed) W. B. WOODS, *Judge.*

Marshal's return.

Received March 31st, 1876, by the U. S. marshal, & on the same
4 day, month, and year served a copy hereof on C. J. Leeds, mayor of the city of New Orleans, by handing it to him in person in this city.

(Signed) S. B. PACKARD,
U. S. Marshal,
By S. W. REED,
D'y Marshal.

Notice of application for writ of mandamus issued, returned, & filed March 31st, 1876.

United States circuit court, fifth circuit, district of Louisiana.

CLERK'S OFFICE,
New Orleans, March 30th, 1876.

UNITED STATES, EX RELATOR W'M S. PETERKIN,
vs.
THE MAYOR ET AL. OF NEW ORLEANS. } No. 7819.

To Edward Pillsbury, adm'r of finance; James G. Brown, adm'r of accounts; Leon Bertoli, adm'r of water-works and public buildings; Dennis McCarth'y, adm'r of police; J. O. Landry, adm'r commerce; P. L. Bouny, adm'r of asses'ments; J. A. Burke, adm'r improvements:

You are hereby notified that, upon the application for a mandamus as prayed for in the above-entitled cause, the court has given the following order:

Let the defendant show cause, on the 15th April, 1876, at 11 a. m., why a writ of mandamus should not issue, as herein prayed for.
March 30th, 1876.

(Signed) W. B. WOODS, *Judge.*

Attest:

F. B. VINOT,
D'y Clk.

5 *Marshal's return.*

Received March 31st, 1876, by the U. S. marshal and on the same day served a copy hereof on the within-named, as follows:
Edward Pilsbury, personally.
James G. Brown, do .
Leon Bertoli on his clerk, T. Bertoli.

Dennis McCarthy on T. Blanchard, hi ary.
J. O. Landry on his clerk, P. Labarre.
P. L. Bouny on his clerk, E. Miltenb r
E. A. Burke, personally.

(Signed) S. B. PACKARD,
Marshal.
By S. W. REED,
Dy Marshal.

Answer.—Filed April 19th, 1876.

U. S. circuit c't.

THE UNITED STATES OF AMERICA, ON THE RE lation of W. S. Peterkin,
vs.
CHARLES J. LEEDS, MAYOR ET AL. } No. 7819.

Now comes Charles J. Leeds, mayor of the city of New Orleans, James G. Brown, Edward Pilsbury, Leon Bertoli, Denis McCarthy, J. O. Landry, P. L. Bouny, and E. A. Burke, administrators respectively of accounts of finance of water works, of police, of commerce, of assessments and of improvements, and for answer to the petition of the relator, W. S. Peterkin, they allege and show—

That they admit the said relator has recovered judgment
6 against the city of New Orleans, that an execution has issued and returned no property found as more fully appears by reference to the judgment, execution, and return thereon in the suit of W. S. Peterkin vs. the city of New Orleans, No. of the docket of this court, specially refer'ed to for fuller explanation and greater certainty.

And further answering these respondents say that said judgment was recovered upon certain bonds, and for the principal thereof, made by the city of New Orleans, for one thousand dollars each, issued by the said city to the New Orleans, Jackson & Great Northern Railroad Co., under the authority of the act of the legislature of Louisiana No. , approved March 15th, 1854, as appears by said record.

And, further answering, these respondents say that no tax whatever for the payment of the principal of said bonds is directed to be levied or collected by the said act or by any other act of the legislature or provision of law, and these respondents refer to said act and especially to the 2d section thereof to show the absence of such provision, and these respondents show that so far respects the interest upon the bonds of the city, required to be provided for, such interest is pro-
7 vided to be paid out of the back taxes due the city of New Orleans and such provision is stated in the budget of said city for 1876.

Inasmuch therefore as the laws of Louisiana have directed no tax to be levied or collected to pay the principal of said bonds, these respondents are wholly without authority to levy and collect said tax and have no duty to perform on the premises and this honorable court is without authority to grant the writ of mandamus prayed for.

Wherefore these respondents pray for judgment in their favor, that the petition of the relator be dismissed with costs, and for general relief

(Signed) FINNEY & MILLER,
(Signed) B. F. JONAS,
Att'ys for Resp'nd's.

Charles J. Leeds, mayor *at* the city of New Orleans, Edward Pilsbury, James G. Brown, Leon Bertoli, Denis McCarthy, J. O. Landry, P. L. Bouny, an' E. A. Burke, administrators respectively of finance, of accounts, of water works, of police, of commerce, of assessments, and of improvements, duly sworn, depose and say that all the facts and allegations in the foregoing petition contained are true and correct.

(Signed) E. PILSBURY, *Ad. F.*
8 (Signed) J. O. LANDRY, *Adm'tr Commerce.*
(Signed) J. G. BROWN, *Adm'tr Pub. Accounts.*

Sworn to and subscribed before me this 19th day of April, A. D. 1876.
(Signed) W. T. HOUSTON,
First Justice of the Peace for the Parish of Orleans.

Judgment referred to in the answer.

Circuit court of the United States, fifth circuit and district of Louisiana.
April term, 1875.

NEW ORLEANS, *Friday, May 21st*, 1875.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.

W. S. PETERKIN
vs.
CITY OF NEW ORLEANS. } No. 7297.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, W. S. Peterkin, do recover from the city of New Orleans the sum of eighteen thousand dollars, with 6% interest on sixteen thousand dollars from 1st May, 1874, and on two thousand dollars from 1st September, 1874, at a like rate till
9 paid, and costs of suit.

It is further ordered and adjudged that execution shall not issue on the judgment rendered in this cause against the defendant until the plaintiff shall file a bond, with surety, to indemnify the defendant against liability on the bonds sued on and proven to have been lost or stolen in case the same should reappear in the hands of any lawful holder and owner thereof claiming title to the same by delivery or legal transfer from plaintiff or his agents.

Judgment rendered May 21st, 1875.
Judgment signed May 26th, 1875.
(Signed) W. B. WOODS, *Judge.*

Writ of fieri facias referred to in the answer.—Issued Nov. 18, 1875, *returned & filed February* 11, 1876.

W. S. PETERKIN
vs.
CITY OF NEW ORLEANS. } No. 7297. Alias fi. fa.

UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth circuit holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district
10 of Louisiana or his lawful deputy, greeting:

You are hereby commanded, as you have heretofore been, to de-

mand from the city of New Orleans the sum of eighteen thousand dollars ($18,000), with 6% interest on $16,000 from 1st May, 1874, and on $2,000 from 1st September, 1874, at a like rate, till paid, and costs of suit; clerk's costs, $8.50; att'y's fee, $20.00; which said sum is subject to a credit of $5,682.45c. from the 27th day of July, 1875, cash, which W. S. Peterkin lately recovered by judgment of the circuit court of the United States for the 5th circuit and district of Louisiana, and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said city of New Orleans in your district, if sufficient personal estate can be found therein, but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said city of New Or-
11 leans in your district, whereof it was owner, on the 26th day of May, 1875, into whose hands soever the same may have come, and that you have those moneys before our said court to render to the said W. S. Peterkin for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of November, A. D. 1875, and 100th year of the Independence of the United States.

[SEAL.] (Signed) F. B. VINOT, *D'y Clk.*

Marshal's return.

Received, November 18, 1875, by the U. S. marshal, and returned no property found.

(Signed) S. B. PACKARD,
U. S. Marshal.
By C. R. STEELE,
Deputy.

12 *Hearing & submission of application.—Extract from the minutes November term*, 1875.

NEW ORLEANS, *Wednesday, April* 19, 1876.

Court met pursuant to adjournment.

Present, Hon. E. C. Billings, district judge.

U. S., RELATION W. S. PETERKIN,
vs.
CITY OF NEW ORLEANS. } No. 7819.

The application for writ of mandamus in above case was called for hearing; Mess'rs Semmes & Mott, Clarke, Bayne & Renshaw, Labatt, Aroni & Chinton, & H. B. Kelly for relator; B. F. Jonas & Finney & Miller for defendants; and after hearing the pleadings and argument, the court took time to advise.

13 *Order for reargument.—Extract from minutes of April 29th*, 1876.

U. S., EX RELATION W. S. PETERKIN,
vs.
CITY OF NEW ORLEANS. } 7819.

Ordered that a reargument be had in the above case on Wednesday, May 3d, 1876, at 11 a. m., counsel being present taking notice hereof.

Reargument & submission of application.—Extract from minutes, May 3d, 1876.

U. S., EX RELATION W. S. PETERKIN,
vs.
CITY OF NEW ORLEANS. } 7819.

After hearing further argument by Mess'rs Semmes & Mott, Tho's Allen Clarke, Labatt, Aroni & Clinton, Henry C. Miller, and B. F. Jonas, the court took time to advise.

Demurrer to the answer.—Filed May 6th, 1876.

Circuit court of United States, district of Louisiana.

THE UNITED STATES, ON THE RELATION OF W. S. Peterkin,
vs.
CITY OF NEW ORLEANS. } 7819.

14 The demurrer of the United States of America on the relation of William S. Peterkin, plaintiff, to the answer of the City of New Orleans, the above-named defendant.

This plaintiff by protestation not confessing all or any of the matters and things in the defendant's answer contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said answer, and for cause of demurrer showeth that the defendant has not made or stated such a defence as to defeat or prevent the right to a mandamus claimed by the plaintiff, and plaintiff hereby prays the judgment of the court as to the answer they have so demurred to as aforesaid, and that said answer be rejected, and that plaintiff have his proper costs and charges.

(Signed) SEMMES & MOTT,
Of Counsel.

We certify that, in our opinion, the foregoing demu'rer is well founded in law.

(Signed) SEMMES & MOTT,
Of Counsel.

Judgment.—Extract from judgment book, April term, 1876.

NEW ORLEANS, *Monday, May 8th*, 1876.

15 Court met pursuant to adjournment.
Present, Hon. Edward C. Billings, district judge.

UNITED STATES, EX RELATION W. S. PETERKIN,
vs.
THE MAYOR ET AL. OF NEW ORLEANS. } 7819.

This cause came on to be heard upon the application for a writ of mandamus and was argued by counsel.

On consideration whereof it is ordered by the court that complainant's demurrer to the answer be overruled and that a writ of mandamus be refused with costs.

Judgment rendered May 8th, 1876.
Judgment signed May 26th, 1876.

(Signed) EDWARD C. BILLINGS,
Judge.

Petition and order for writ of error.—Filed June 8th, 1876.

In the circuit court of the United States for the 5th circuit and district of Louisiana.

THE UNITED STATES OF AMERICA, ON THE RELATION of William S. Peterkin,
vs.
THE MAYOR ET AL. OF THE CITY OF NEW ORLEANS. } 7819.

The petition of the United States of America on the relation of William S. Peterkin, with respect represents:

16 That on the 8th day of May, 1876, in the above-entitled cause numbered as aforesaid, a judgment has been rendered against petitioner by this honorable court in favor of Charles J. Leeds, mayor of the city of New Orleans, Edward Pillsbury, administrator of finance of the city of New Orleans; Leon Bertoli, administrator of water-works & public buildings of the city of New Orleans; James G. Brown, administrator of accounts of the city of New Orleans; Denis McCarthy, administrator of police of the city of New Orleans; J. O. Landry, administrator of commerce of the city of New Orleans; P. L. Bouny, administrator of assessments of the city of New Orleans; and E. A. Burke, administrator of improvements of the the city of New Orleans; which was signed on the 26th day of May, 1876. Your petitioner considers that manifest error hath happened to the great injury and damage of petitioner; and feeling aggrieved by said judgment he desires to prosecute a writ of error from the aforesaid judgment before the Supreme Court of the United States.

Wherefore he prays that a writ of error be allowed him from the judgment heretofore referred to, returnable before the Supreme
17 Court of the United States in accordance with law, upon petitioners giving bond in the sum of two hundred and fifty dollars, conditioned according to law.

(Signed) JOHN J. SEMMES,
ROBERT MOTT,
Att'ys for Pet'rs.

Allowed.
(Signed) EDWARD C. BILLINGS,
Judge.

Bond for writ of error.—Filed June 8th, 1876.

UNITED STATES OF AMERICA:

Know all men by these presents that we, The United States of America, on the relation of William S. Peterkin and Joseph Hernandez, are held and firmly bound, jointly and severally, unto Charles J. Leeds, the mayor; Edward Pillsbury, administrator of finance; James G. Brown, administrator of accounts; Leon Bertoli, administrator of water-works and public buildings; Denis McCarthy, administrator of police; J. O. Landry, administrator of commerce; P. L. Bouny, administrator of assessments, and E. A. Burke, administrator of improvements, the same being the mayor & administrators of the city of New Orleans, in the sum of two hundred & fifty dollars, lawful money of the United States of America, to be paid to the said mayor and administrators of the city

of New Orleans, their successors and assigns, for which payment
18 well and truly to be made, we bind ourselves, and each of us by himself and each of our heirs, executors, and administrator', firmly by these presents, sealed with our seals and dated 8th day of June, in the year of our Lord eighteen hundred and seventy-six.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in & for the district of Louisiana, in a suit depending in said court wherein the United States of America, on the relation of William S. Peterkin, were plaintiffs and the Mayor and Administrator' of the City of New Orleans were defendants, and a final judgment was rendered against the United States of America, on the relation of William S. Peterkin, and the said United States of America, on the relation of said William S. Peterkin, having obtained a writ of error & filed a copy thereof in the clerk' office of said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to said mayor & administrator' of the city of New Orleans, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next: Now, the condition of the above obligation that we, the above bounden United States of America, on the relation of W'm S. Peterkin, will well & truly pay the defendants in said writ of error all such damages as
19 the' may recover against us in case it should be decided that the said writ of error was wrongfully obtained.

(Signed) THE UNITED STATES OF AMERICA,
ON THE RELATION OF W'M S. PETERKIN,
By ROBERT MOTT, *Its Att'y at Law.* [L. S.]
(Signed) J. HERNANDEZ. [L. S.]

Signed, sealed, and delivered in the presence of—

Approved.
(Signed) EDWARD C. BILLINGS,
Judge.

20 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 19 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of The United States, ex rel. William S. Peterkin, versus The mayor et al. of the city of New Orleans, No. 7819 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this day of , A. D. 18 .
[SEAL.] F. A. WOOLFLEY,
Clerk.

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate

is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 9th day of September, A. D. 1876.

EDWARD C. BILLINGS,
Judge.

21 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States of America, on the relation of William S. Peterkin, and Charles J. Leeds, the mayor; Edward Pillsbury, administrator of finance; James G. Brown, administrator of accounts; Leon Bertoli, administrator of water-works & public buildings; Denis McCarthy, administrator of police; J. O. Landry, administrator of commerce; P. L. Bouny, administrator of assessments; & E. A. Burke, administrator of improvements, the same being the mayor & administrators of the city of New Orleans, No. 7819 on the docket thereof, a manifest error hath happened, to the great damage of the said United States of America on the relation of William S. Peterkin, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 8th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 7819. United States, ex rel. W'm S. Peterkin, plaintiff in error, versus The Mayor & als. of the City of New Orleans, defendants in error. Writ of error. Filed June 8th, 1876. F. B. Vinot, d'y cl'k.

22 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Charles J. Leeds, the mayor; Edward Pillsbury, administrator of finance; James G. Brown, administrator of accounts; Leon Bertoli, administrator of water-works and public buildings; Denis McCarthy, administrator of police; J. O. Landry, administrator of commerce; P. S. Bouny, administrator of assessments; and E. A. Burke, administrator of improvements, the same being the mayor and administrators of the city of New Orleans, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein the United States of America on the relation of William S. Peterkin, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD C. BILLINGS, *Judge.*

23 (Indorsed:) United States circuit court. No. 7819. United States, ex rel. W'm S. Peterkin, plaintiffs in error, vs. The Mayor et als. of the City of New Orleans, defendants in error. Citation.

Marshal's return.

Service accepted and citation waived.

B. F. JONAS,
Att'y for Defendants.

JUNE 9TH, '76.

(Indorsement on cover:) No. 188. United States, ex rel. William S. Peterkin, plaintiff in error, vs. The Mayor & Board of Administrators of the City of New Orleans. Louisiana C. C. U. S. Filed 5th October, 1876.

Supreme Court United States.

OCTOBER TERM, 1878.

No. 188.

THE UNITED STATES Ex Rel WM. S. PETERKIN,

Plaintiff in Error,

vs.

THE MAYOR and BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS,

Defendants in Error.

OCTOBER TERM, 1878.

No. 189.

THE UNITED STATES Ex Rel JAMES WADICK,

Plaintiff in Error,

vs.

THE MAYOR and BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 188.

THE UNITED STATES EX REL WM. S. PETERKIN, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS, DEFENDANTS IN ERROR.

OCTOBER TERM, 1878.

No. 189.

THE UNITED STATES EX REL JAMES WADICK, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

These two cases are precisely similar in fact and in principle.

The relators recovered judgments against the city of New Orleans in the Circuit Court in April and May, 1875. (P. 4.) Executions were issued, and returned *nulla bona*. (P. 5.) Thereupon, in March, 1876, the relators applied for

writs of *mandamus*, to compel the administrators of the city to levy and collect a tax sufficient to pay their judgments, with interest and costs.

The administrators filed answers, in which, after admitting that judgments had been recovered against the city as stated in the petitions, that executions had been issued and returned no property found, they proceed as follows: That said judgments were recovered upon certain bonds, made by the city of New Orleans, for $1,000 each, issued by the said city of New Orleans to the New Orleans, Jackson and Great Northern Railroad Company, under the authority of the act of the Legislature of Louisiana, No. 109, approved 15th of March, 1854; that no tax whatever, for the payment of the principal of said bonds, is directed to be levied or collected by the said act, or by any other act of the Legislature or other provisions of law; that said judgments are recovered for the principal alone of said bonds, and respondents refer to said act, and especially to the second section thereof, to show that no provision is made for any tax whatever for the payment of the principal of said bonds, or any part thereof. And forasmuch as the laws of Louisiana have directed no such tax to be levied or collected, and have made no provision by taxation to pay said principal, for which said judgments were recovered, respondents are without legal authority to levy and collect such tax.

To this answer or return the relators demurred. (P. 5.) The court overruled the demurrer, and refused to grant writs of *mandamus*. (P. 6.)

The cases are brought here to review the action of the Circuit Court in refusing to grant the writs of *mandamus*.

The opinion of the court is not found in the transcript. It is reported in 2 Woods' R., p. 231.

The act of the Legislature under which the bonds were issued is No. 109, approved 15th of March, 1854, and is entitled "An act for the subscription by the city of New

Orleans to the stock of the New Orleans, Jackson and Great Northern Railroad Company."

The first section authorizes the common council of the city of New Orleans to subscribe to the stock of the New Orleans, Jackson and Great Northern Railroad Company in a sum not exceeding $2,000,000.

The second section reads as follows:

"That any ordinance authorizing such subscription shall contain the following provisions, to wit:

"1st. A statement of the number and amount of shares for which the city subscribes.

"2d. That the subscription of the city shall be made by the mayor, and shall be payable in bonds of said city for $1,000 each, having twenty years to run, bearing interest at the rate of six per cent. per annum, with interest coupons attached, payable semi-annually in New Orleans or New York, as the company entitled to receive them may prefer, transferable by the indorsement of the president and secretary of said company, and convertible into the stock of said company, at the option of the holder, at any time within ten years after their date.

"3d. That a special tax on real estate and slaves shall be levied in January of each year, sufficient to pay the annual interest on said bonds, specifying the rates of said tax, which shall be collected at the same time and in the same manner as the consolidated loan tax of said city, and all ordinances, resolutions, or other acts passed by said council after the first day of January in each year, except an ordinance to impose said consolidated loan tax, and an ordinance to impose a tax for the payment of interest on bonds which may be hereafter issued for subscription to the New Orleans, Opelousas and Great Western Railroad Company shall be null and void, unless a resolution imposing a special tax for the payment of interest on said bonds issued to the railroad company herein named shall have been previously passed; *Provided*, that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of six per cent. per annum on the stock of said company, held by the city as hereinafter provided, which dividends shall be applied by the city to the payment of the interest; *and provided*

further, That whenever the dividends on said railroad stock of the city shall amount to more than six per cent. per annum, the excess, after the payment of interest, shall be applied to the purchase of the city bonds issued under the provisions of this act; it being understood that when dividends for less than six per cent. per annum are received on the railroad stock of the city, a tax for interest shall be levied for the difference only between the amounts of said annual dividends and the amount of the annual interest."

The residue of the section has no application to the case.

Section 3 provides "that the city bonds issued to said railroad company shall be received by it at par value, and said railroad company shall issue to the city of New Orleans certificates of stock for an amount equal to the amount of the bonds received, and the stock of the company thus issued to the city of New Orleans shall remain forever pledged for the redemption of said bonds; *Provided*, however, that any holder of said bonds, who may desire to convert them into the capital stock of the company to which they may have been issued, shall, on application to the treasurer of said city, and on surrender to him of the bonds to be converted, receive from said treasurer a transfer of the stock represented by the bonds surrendered, and said bonds shall be immediately cancelled."

No other portion of the act of 1854 is material to the case.

The court below held, that the pledge of the stock for the redemption of the bonds, accompanied by a provision for a special tax to pay only the interest on the bonds, manifested a legislative intention, that if the stock was insufficient in value to pay the bonds at maturity, the bondholder had no right to exact payment by means of taxation, and therefore the city administrators had no power to levy a tax, as demanded of them by the relators.

Assignment of Errors.

1. The court below erred in its construction of the act of 1854, No. 109, in holding that because said act made provision for the redemption of said bonds by pledging for that purpose the stock obtained by the city from the railroad company, that therefore there was no obligation on the part of the city to pay the principal of said bonds by taxation, and no consequent duty or power to levy a tax for that purpose.

2. The court erred in going into the question of the general liability of the city to pay the principal of said bonds and interest after maturity, because the judgments rendered against the city had settled the question of liability to pay, without restriction as to means of payment; and as the judgments were rendered on obligations issued in 1854, the relators were entitled to all the remedies then existing as part of their contract, viewed as an unrestricted and unconditional debt.

3. The court below erred in holding, that there was no law, general or special, imposing on respondents the duty to levy a tax to pay the judgments of relators; and further, that there was no law authorizing respondents to levy any such tax.

Before proceeding to the argument, the attention of the court is called to the original charter of the city of New Orleans, passed in the year 1805.

Section 6 of that act provides, "That the said mayor and counsel shall have power to raise, by tax, in such manner as to them may seem proper, upon the real and personal estate within said city, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleaning, paving, and watering the streets of the said city; for supporting the city watch, the levee of the river, the prisons, work-houses, and other public buildings, and for such other purposes as the police and good government of the said city may require."

The act of 1836, page 31, section 4, continued to the several municipalities, into which the territory of the old city was then divided, the powers of the old corporation, and these powers were again continued, when the different municipalities, with additions, were consolidated in 1852; and the same powers were continued to the city through all its changes, until the judgments of the relators were rendered.

City charter of 1856, Acts of 1856, page 147.
City charter of 1870, Act No. 9, extra session of 1870.

There are certain propositions which we consider settled, and therefore do not propose to discuss. They are:

1. The *validity* of the original debt or bonds, on which the relators have obtained jndgments, cannot now be questioned.

2. The power to contract a debt by issuing municipal bonds carries with it, by necessary implication, the power to provide for the payment or redemption thereof by the levy and collection of a tax, unless the contrary expressly appears.

Leon Co. *v.* Topeka, 20 Wall., 660.
Lowell *v.* Boston, 111 Mass., 1160.
Armstrong *v.* Allegheny, 37 Penn., 290.
Armstrong *v.* Perkins, 113 Penn., 403.

3. That the authority given to a municipal corporation to create a debt, implies an obligation to pay it by taxation, unless some other mode of payment is expressly provided; and the security which may be given for the payment of a debt is not to be confounded with the obligation to pay.

The application of these principles, it seems to us, settles this case. It is clear, that the third section of the act of 1854, which provides "that the stock of said company shall remain forever pledged for the redemption of said bonds," merely creates a pledge or security for the pay-

ment of the bonds, and is distinct from the obligation to pay implied in the authority to issue the bonds; and it is equally clear, that the obligation to pay carries along with it the power to tax, in order to provide for payment. This is made apparent from the fact that the pledge thus created is a pledge for the redemption of the bonds, that is to say, principal and interest; although a special tax is provided for the payment of interest, it is not exclusive of the pledge, and therefore the pledge is not exclusive of the implied power to tax for the payment of the principal of the bonds. In the language of the court, used in the case of United States *v.* County of Clark, 96 U. S., p. 214, "there is no provision in the act that the proceeds of the special tax [here the pledge] shall alone be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing, in legislation, to provide a particular fund, as additional security for the payment of a debt."

Besides, it seems to us that if the obligation to pay the principal of the bonds were restricted to the stock pledged for their redemption, the proper time for the city of New Orleans to have argued such a construction of the act of 1854, was when sued on the bonds. It has allowed a general judgment to go against it, an absolute judgment for so much money, unrestricted in its terms. For aught that appears, the city may have urged this defense in the suit on the bonds, and therefore the judgment rendered is *res judicata* on the point now suggested.

The general power to levy taxes "for such other purposes as the police and good government of the said city may require," delegated in 1805, is sufficient to authorize the city of New Orleans to levy the taxes demanded, irrespective of the implied power conferred when it was authorized to issue the bonds. (Opinion of Chief Justice Waite, in the case of Parsons *v.* City of Charleston, decided in the South Carolina Circuit.)

The matters in controversy in this case are so fully argued in briefs filed in the case of United States *ex rel* Morris Ranger *v.* New Orleans, No. 150 on the docket of this court, that we refrain from trespassing on the time of the court with an extended argument in these cases.

Respectfully submitted.

THOMAS J. SEMMES.
ROBERT MOTT.

UNITED STATES SUPREME COURT.

No. 188.

THE UNITED STATES, EX. REL., W. S. PETERKIN,

vs.

THE CITY OF NEW ORLEANS.

Brief for Defendant.

This case involves the same issue as No. 150, to the brief in which we refer—and ask for the affirmance of the judgment.

Respectfully submitted,

B. F. JONAS,

H. C. MILLER.

Of Counsel for City.